ASC

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Editorial

Stakeholders unprepared for implementation of Pre-packaged Insolvency for Corporate MSMEs

Four months have already passed when this beneficial legislation was introduced by law makers in April, 2021 but the activity at the ground level is not to be seen. Insolvencies have definitely set in due to first and second wave of Covid-19, but the base plans of MSME Promoters are yet to land at the doors of Financial Creditors for decision making. Similarly, from the visits to Banks and Financial Institutions, we gather that their corporate offices have yet to frame process guidelines for handling the base resolution plans and delegation of powers to the field functionaries. The action lies at MSME Ministry for educating the Promoters what are the benefits under the law or available to them for curing the insolvency and how to go about.

The Banks and the Financial Creditors can very well examine their loan books to find out how many MSMEs are defaulting on their repayment commitments and experiencing Insolvencies. The comforting communications should go from the Banks to such Insolvent MSMEs encouraging them to approach for initiating resolution to their financial stress.
Some very special follow up and push from concerned Ministries and IBBI is required to sensitize the stakeholders so that they can avail the benefits under the pre-packaged Insolvency Law.
Expect more vibrancy from Insolvency Resolution Process

Stay Alert!

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1. Parliamentary Panel recommends easing of a Homebuyer's burden in initiating Insolvency

The Panel sought to address the practical difficulties of a Homebuyer gathering the required number of purchasers to initiate Insolvency

A parliamentary panel set up to study the "pitfalls" in the implementation of the Insolvency and Bankruptcy Code (IBC) has recommended the government to introduce a provision in IBC making it mandatory for builders to provide details of all customers in a project. The panel said in its report that homebuyers are facing practical difficulties in gathering the required number of purchasers to initiate insolvency proceedings against the real estate owner.

According to a 2018 amendment to the IBC, a minimum of 100 homebuyers or 10% of the total purchasers, whichever is less, are needed for initiating the insolvency process against builders in respect of the project. The Forum for People's Collective Efforts (FPCE), which had campaigned for the enactment of the real estate law (RERA), had submitted to the parliamentary standing committee on Finance as to how the provision was impractical and puts homebuyers in a disadvantageous position compared to builders.

The Committee has therefore recommended that once a single homebuyer decides to initiate insolvency proceedings in NCLT, the real estate owner should be obliged in the Rules and Guidelines to provide details of other homebuyers of the project to the homebuyer concerned so that the required 10% or 100 homebuyers could be mobilized, which will thus ensure the interest of the homebuyers.

Point 1 Source: https://timesofindia.indiatimes.com/india/create-provision-in-ibc-code-for-builders-to-give-details-of-all-home-buyers-if-one-files-for-bankruptcy-resolution-parl-panel/articleshow/85136612.cms

2. Stay by NCLAT on a Resolution Plan of Twin Star Technologies in Videocon's Insolvency

Twin Star Technologies offered Rs 2,962 crore for 13 group firms of Videocon providing 99.28 per cent haircut to the operational creditors

The National Company Law Tribunal (NCLT) approved the resolution in the Insolvency of Videocon Industries, paving the way for billionaire Anil Agarwal's Twin Star Technologies to take over the consumer durables to the oil group. Twin Star Technologies offered Rs 2,962 crore for 13 group firms of Videocon. These included Videocon Industries, Videocon Telecom, Evans Fraser & Co, Millennium Appliances India, Applicomp, Electroworld Digital Solutions, Techno Kart India, Techno Electronics, Century Appliances, Value Industries, PE Electronics, CE India and Sky Appliances. The NCLT approving the proposal of Twin Star Technologies could have meant another high-profile Insolvency case being concluded.

However, the Resolution Plan has been put on hold by the National Company Law Appellate Tribunal (NCLAT) after the dissenting creditors filed an appeal. The aggrieved creditors included smaller lenders like Bank of Maharashtra, IFCI, Morgan Securities, SIDBI and ABG Shipyard, even as some of the top lenders voted in favour of the proposal.

Interestingly, the Promoter of Videocon has also filed an appeal and wants the NCLAT to consider his settlement plan of Rs. 31,789 crores which had earlier been rejected by the Committee of Creditors (CoC). The Promoter has contended that the assets owned by Videocon Group, particularly oil and gas assets, were not included in the Information Memorandum and no valuation thereof was considered. Thus, he has requested that a fresh Resolution Plan be considered taking into consideration the oil and consumer durable assets of the Corporate Debtor.

3. NCLT admits Insolvency plea against McLeod Russel

Techno Electric has approached the Tribunal claiming that the Indian Tea Company failed to abide by a loan agreement

The National Company Law Tribunal (NCLT), Delhi has admitted an Insolvency application moved by Techno Electric and Engineering Co. Ltd against the Indian Tea producer McLeod Russel India Limited in respect of a default on a 100 crore inter-corporate loan. The Adjudicating Authority while imposing a moratorium under Section 14 of the Insolvency and Bankruptcy Code (IBC) recorder that there had been a default in payment of the financial debt and that the Applicant was entitled to claim the outstanding financial debts from the Corporate Debtor.

The loan agreement, which forms the subject matter of the default, concerned the grant of an inter-corporate deposit of Rs 100 crores to the Corporate Debtor subject to the condition that the same would be utilized by it for the purpose of repayment of loans relating to four tea estates, i.e Addabarie Tea Estate, Mahakali Tea Estate, Dirai Tea Estate and Rajmai Tea Estate that were due to banks and financial institutions in order to ensure that all encumbrances created on the four tea estates are released by the

Point 3 Source t: https://www.barandbench.com/news/litigation/nclt-insolvency-indian-tea-company-mcleod-russel

and financial institutions. It was also agreed that the title deeds of the said four estates be handed over to Techno after the repayment of the said loan amounts.

However, the Corporate Debtor was stated to have failed to handover the title deeds and repay the entire loan amount within the due time. It was submitted by the Corporate Debtor that the amount had not become due yet as the recovery was first supposed to be done from secured assets which, according to the Corporate Debtor were sufficient to clear the liabilities and that no arrears would be left to be recovered from McLeod. But the Applicant contended that the concerned clause in the agreement only protected McLeod when there was a failure to recover the default amount from secured assets. NCLT concurred with this and ordered the initiation of Corporate Insolvency Resolution Process against the Corporate Debtor.

4. Money Decree/ Certificate of Recovery in favour of the Financial Creditor gives fresh cause of action to initiate CIRP under Section 7 of IBC: Supreme Court

The Court cited the reason that Insolvency and Bankruptcy Code, 2016 is a self-contained Code and warrant no interference by the High Courts

The Supreme Court observed that a judgment and/or decree for money in favour of the Financial Creditor, or the issuance of a Certificate of Recovery in its favour, would give rise to a fresh cause of action for the Financial Creditor, to initiate proceedings under Section 7 of the IBC for initiation of corporate insolvency resolution process (CIRP). According to the Apex Court, such Judgement or Decree may be passed by the Debt Recovery Tribunal, or any other tribunal or court, and in such cases CIRP can be initiated, within three years from the date of the judgment and/or the decree or within three years from the date of issuance of the Certificate of Recovery, if the dues of the Corporate Debtor to the Financial Creditor, or any part thereof remained unpaid.

The Bench also observed that an application under Section 7 of the IBC would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as NPA, if there were an acknowledgement of the debt by the Corporate Debtor before expiry of the period of limitation of three years as in such a case the period of limitation would get extended.

In this case, the Adjudicating Authority had admitted the Petition under Section 7 of the IBC, filed by the Financial Creditor. In appeal, the Appellate Adjudicating Authority held that the said application was barred by limitation. NCLAT also found that there was nothing on record that suggested that the Corporate Debtor had acknowledged its debt to the Bank. In appeal, the bank contended that Section 18 of the Limitation Act applied to proceedings under the IBC.

The Apex Bench laid down that an acknowledgement of present subsisting liability, made in writing in respect of any right claimed by the opposite party and signed by the party against whom the right is claimed, has the effect of commencing a fresh period of limitation from the date on which the

Point 4 Source t:https://www.livelaw.in/top-stories/supreme-court-cirp-fresh-cause-of-action-decree-money-recovery-certificate-178852

acknowledgement is signed. Such acknowledgement need not be accompanied by a promise to pay expressly or even by implication. However, the acknowledgment must be made before the relevant period of limitation has expired.

5. Bill on Pre-packaged Insolvency Resolution process for MSMEs tabled

The Bill is set to replace the IBC Amendment Ordinance 2021 which introduced pre-packs as an insolvency resolution mechanism for MSMEs

Finance and Corporate Affairs Minister Nirmala Sitharaman introduced the Insolvency and Bankruptcy Code (Amendment Bill), 2021 in the Lok Sabha. The Bill is set to replace the IBC Amendment Ordinance 2021 promulgated in April which introduced pre-packs as an Insolvency resolution mechanism for micro, small and medium enterprises (MSMEs).

Distressed Corporate Debtors (CDs) are permitted to initiate a Pre-packaged Insolvency Resolution Process (PIRP) with the approval of two-thirds of their creditors to resolve their outstanding debt under the new mechanism. CDs are also required to submit a base Resolution Plan at the time of the initiation of the PIRP. Unlike in the case of corporate insolvency resolution process (CIRP), debtors remain in control of their distressed enterprise during the PIRP.

The PIRP also allows for a Swiss challenge to the Resolution Plan submitted by a CD in case Operational Creditors are not paid 100 per cent of their outstanding dues. Under the Swiss challenge mechanism, any third party would be permitted to submit a Resolution Plan for the distressed company and the original applicant would have to either match the improved Resolution Plan or forego the investment.

Besides offering a way for MSMEs to restructure their debts, the pre-pack scheme could also reduce the burden on benches of the National Company Law Tribunals (NCLTs) by offering a faster resolution mechanism than ordinary CIRPs.

6. About 19,000 insolvency cases closed, Liquidation remains minimal: Opinion my IBBI Chief Mr. Sahoo

The basic idea is to provide a platform which enables the Debtor and the Creditors to work out a resolution consensually, within the basic structure of the Code, he said

Amid growing criticism that the Insolvency and Bankruptcy Code (IBC) has yielded more Liquidation than Resolution, Mr. MS Sahoo, the Chairman of the Insolvency and Bankruptcy Board of India (IBBI), in an interview has stressed that as many as 19,000 cases have been closed either before or after admission; so, if the entire universe of companies touching the IBC is considered, the percentage of those proceeding for Liquidation is negligible. He also refuted the claim of massive haircuts for lenders due to the IBC. On an average, the asset value of the companies that witnessed resolution until March 2021 was only 22% of their dues to creditors when they entered the IBC, he said. This means that while creditors were staring at a haircut of 78% to start with, the IBC not just rescued these companies but also reduced the haircut to 61% for Financial Creditors, he explained.

Emphasizing the minimal ratio of companies going into Liquidation, he stated that out of the companies proceeding for Liquidation, three-fourths were defunct, and of the companies rescued, one-third were defunct. This means that out of the companies touching the finishing line, two-thirds were defunct to start with. The companies ending up with liquidation had assets valued, on an average, at about 6% of the claims against them, when they entered the IBC. If a company has been sick for years and the assets have depleted significantly, the market is likely to liquidate it.

Point 6 Source t: https://www.financialexpress.com/industry/about-19000-insolvency-cases-closed-liquidation-remains-minimal-ibbi-chief-sahoo/2304251/

LATEST JUDGMENTS

1. Rakesh Kumar Agarwal versus Mr. Devendra P. Jain

Changes to the classification of MSMEs brought about by the Government applicable to MSMEs undergoing Liquidation

The National Company Law Appellate Tribunal (NCLAT), New Delhi held that the government notification dated June 1, 2020, concerning the changes to the classification of micro, small and medium enterprises (MSMEs) under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act), will be applicable to the Corporate Debtors, whose Liquidation process was still pending under the Code. The NCLAT, New Delhi, while reiterating that the main objective of the Code is to resolve the Insolvency and that the Liquidation of the Corporate Debtor is only a last resort, set aside the order of the Adjudicating Authority which had found the notification inapplicable to the Corporate Debtor since it came into effect at a later date on July 1, 2020.

2. Jayanta Banerjee versus Shashi Agarwal Liquidator of INCAB Industries Limited & Ors.

Meeting of CoC cannot be held without verification and admission of claims

The National Company Law Appellate Tribunal (NCLAT), New Delhi held that the word 'collation' under S. 21(1) of the Code means verification of the claims of the creditors, or in other words, the comparison of a copy with its original in order to verify its correctness. The Appellate Adjudicating Authority held that a meeting of the Committee of Creditors (CoC) cannot be held without verification and the admission of the claims of the creditors and followed by the assignment of voting shares to such creditors. Further, the NCLAT, New Delhi held that the exercise of the commercial wisdom of the CoC cannot be used as a pretext for validating the decisions taken by the CoC, whose very formation has been found to be against the provisions of the Code.

3. The Assistant Commissioner of Central Tax versus Mr. V. Shanker & Ors.

A delay in filing of Claim cannot be effected by a mere letter addressed to NCLT

The National Company Law Appellate Tribunal (NCLAT), New Delhi, while observing that delays in the CIRP affect the maximization of the value, held that a mere letter addressed to the National Company Law Tribunal (NCLT) for the purposes of condonation of delay in the submission of a Claim cannot be said to fulfil the requirements of Part III of the National Company Law Tribunal Rules, 2016, Section 60 of the

Citation point 1 : C.P. (IB) 195/MB/2019

Code, the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, and the Insolvency and Bankruptcy Board of India (IBBI) (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

4. Dwarkadish Sakhar Karkhana Limited versus Pankaj Joshi, RP of KGS Sugar & Infra & Anr.

The National Company Law Appellate Tribunal (NCLAT) upheld the decision of the NCLT, Mumbai setting aside the decision of the CoC to accept the expression of interest (EoI) of a resolution applicant after the due date, on the grounds that the CoC did not assign any reasons for revisiting its earlier decision of rejecting the EoI of the resolution applicant. The NCLAT, New Delhi held that the CoC, in the shelter of maximisation of the value of the assets, cannot be permitted to take any decision at any point of time in the name of commercial wisdom. The court distinguished the case at hand from the decision of the Supreme Court in the case of Kalpraj Dharamshi v. Kotak Investment Advisors, by stating that in the case of Kalpraj, the actions of RP, including the acceptance of the Resolution Plan after the due date had been consciously approved by the CoC.

5. Earth Gracia Buildcon Pvt Ltd versus Earth Infrastructure Ltd.

The National Company Law Appellate Tribunal (NCLAT), New Delhi while relying upon the decision of the Supreme Court in Phoenix Arc Pvt Ltd versus Spade Financial Services Ltd & Ors., held that a sham/ round tripped transaction will not classify as a 'Financial Debt' for the purposes of the Insolvency and Bankruptcy Code, 2016.

6. Hytone Merchants Pvt Ltd versus Satabadi Investment Consultants

The the NCLAT, New Delhi held that even an application that is otherwise compliant with the requirements of S. 7 of the Code can be dismissed by the National Company Law Tribunal (NCLT), under S. 65 of the Code, if the said application is found to be filed collusively.

Citation point 6 : Company Appeal (AT)(Insolvency) No. 233 of 2021

For enquiries related to:

- Insolvency Process,
- Bankruptcy Process,
- Filing petition with NCLT/DRT,
- Appointment of Insolvency Professionals,
- Assets Management of the Company,
- Fresh Start Process,
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